Johor Coastal Development Sdn Bhd v Constrajaya Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-02–742 OF 2001
GOPAL SRI RAM, RICHARD MALANJUM AND AUGUSTINE PAUL JJCA
14 JANUARY 2005

Contract — Breach — Termination — Whether appellant had right to whole of 50% of purchase price that was paid without proof of actual damage — Contracts Act 1950 s 75

Contract — Deposit — Forfeiture — Refund of deposit — Whether 12% paid by respondent was true deposit and thus forfeitable — Whether 12% deposit on contract for sale of land extortionate

Contract — Terms — Construction — Contradiction between clauses in agreement giving rise to ambiguity — Whether contra proferentum rule should be applied

The respondent entered into two agreements to purchase land ('the agreements') from the appellant and to construct buildings, in accordance with the appellant's plans, on the purchased land. The appellant's aim was to have a sea front project in Johor Bahru for the aesthetic improvement of the city. It was agreed between the parties that the purchase price for the land was to be paid by instalments. It was also agreed between the parties that in the event of a justified termination of the agreements cll 8.2 and 16.2 of the agreements would prevail. The respondent made 'the first payment' of 12% of the purchase price or RM918,000 as required under the agreements and subsequent payments amounting in total to about 50% of the purchase price under both agreements and then defaulted in its payments. The appellant claimed that the respondent was in breach of the agreements and that it had forfeited all the monies paid to the appellant. The respondent commenced proceedings by originating summons and sought to recover all the money it had paid the appellant. The judicial commissioner who heard the summons held that the respondent was entitled to recover the whole sum paid by it and granted the appropriate relief. It was the appellant's stand that it was entitled to retain the whole of the forfeited sum without proof of damage because of cl 16.2 of the agreements. Hence this appeal wherein two issues arose for consideration. The first issue was whether the 12% paid by the respondent

was a true deposit and thus forfeitable and the second issue was whether the appellant could keep for itself the whole of the 50% of the purchase price that was paid without proof of actual damage.

Held, allowing the appeal in part and setting aside part of the High Court order:

(1) The first payment was not described in any part of the agreements as a forfeitable deposit. However, this did not prevent the court from examining the agreements and coming to the conclusion that the first payment of 12% of the purchase price was a deposit. According to cl 8.2(b) of the agreements the function of the first payment is to secure the future performance of the contract and that is exactly what a true deposit does. Thus what the parties had described in their agreements as a first payment was, when the agreements were construed as a whole, in reality a true deposit (see paras 7–8).

(2) The fact that the deposit in this case was 12% did not make it unusual or extortionate in the circumstances of this case. In any case, the appellant was not engaged in a mere sale and purchase transaction of land but was involved in a project to architecturally enhance the beauty of a city. As such, the appellant would have to now retrieve from the respondent the plans that had been drawn for a composite development and go about looking for a more reliable developer. In the circumstances the 12% was a fair and reasonable deposit which was forfeitable (see para 9).

(3) Under s 75 of the Contracts Act 1950 ('the Act') a true deposit may be forfeited in the event of a default as it represents a genuine pre-estimate of the damage suffered by a vendor. However, any further sum paid towards the balance of the purchase price could only be forfeited upon proof of actual damage. Therefore, in the present case the appellant was only entitled to forfeit the balance of the sums paid if it proved damage and as there was no such proof, it would have to return those monies to the respondent (see para 13).

(4) If cl 16.2 of the agreements entitled the appellant to retain the whole of the forfeited sum without proof of damage then its effect was to exclude the application of s 75 of the Act. However, if cl 16.2 were to have such a meaning it contradicts cl 8.2(b) of the agreements because while the latter says that the appellant must refund the balance, after deducting the 12%, the former says the opposite. When there was such a contradiction between two clauses in an agreement, then there arose an ambiguity as to their joint effect. Since the appellant had chosen to rely on cl 16.2 to justify the forfeiture, that clause should be read contra

proferentum the appellant and the resulting ambiguity between it and cl 8.2(b) must be resolved in the respondent's favour. This meant that it was not open for the appellant to keep all the monies (see para 20).

[Bahasa Malaysia summary

Responden menandatangani dua perjanjian pembelian tanah (perjanjian-perjanjian tersebut) daripada perayu dan akan membina bangunan-bangunan, mengikut perancangan perayu, di atas tanah yang dibeli tersebut. Tujuan perayu ialah untuk mewujudkan projek tepian pantai di Johor Bahru bagi kemajuan estetik bandar tersebut. Adalah dipersetujui oleh kedua-dua pihak bahawa harga pembelian tanah tersebut dibayar secara ansuran. Juga dipersetujui bahawa jika berlaku pembatalan perjanjian yang wajar, klausa 8.2 dan 16.2 akan terpakai. Responden membuat bayaran pertama sebanyak 12% daripada harga pembelian atau sebanyak RM918,000 seperti yang dikehendaki oleh perjanjian-perjanjian tersebut dan bayaran selepasnya berjumlah kira-kira 50% daripada harga pembelian mengikut kedua-dua perjanjian tersebut dan kemudiannya gagal membuat bayaran. Perayu menyatakan bahawa responden melanggar perjanjian-perjanjian tersebut dan bahawa ia telah menyita kesemua wang yang telah dibayar kepada perayu. Responden kemudian memulakan prosiding melalui saman pemula dan memohon untuk mendapatkan semula kesemua wang yang telah dibayar kepada perayu. Pesuruhjaya kehakiman yang mendengar saman tersebut memutuskan bahawa responden berhak mendapat kembali kesemua wang yang telah dibayar dan memerintahkan relief yang bersesuaian. Perayu menegaskan bahawa ia berhak terhadap kesemua jumlah yang disita tanpa perlu membuktikan kerugian berdasarkan klausa 16.2 perjanjian-perjanjian tersebut. Maka, rayuan ini di mana dua isu dibangkitkan untuk pertimbangan. Isu pertama ialah sama ada 12% yang dibayar oleh responden merupakan deposit sebenar dan boleh disita dan isu kedua adalah sama ada perayu boleh menyimpan keseluruhan 50% daripada harga pembelian yang dibayar tanpa membuktikan kerugian sebenar.

Diputuskan, membenarkan sebahagian rayuan dan menolak bahagian yang diperintahkan oleh Mahkamah Tinggi:

(1) Bayaran pertama tidak dinyatakan dalam mana-mana bahagian perjanjian-perjanjian tersebut sebagai deposit boleh sita. Tetapi, mahkamah tidak dihalang daripada meneliti perjanjin-perjanjian tersebut dan memutuskan bahawa bayaran pertama sebanyak 12% daripada harga pembelian merupakan deposit. Menurut klausa 8.2(b) perjanjian-perjanjian tersebut, fungsi bayaran pertama adalah untuk menjamin pelaksanaan masa depan kontrak itu dan itulah tujuan sebenar sesuatu deposit dibayar. Maka, apa yang dinyatakan oleh

pihak-pihak dalam perjanjian-perjanjian ini secara keseluruhannya, sebagai bayaran pertama, sebenarnya merupakan deposit sebenar (lihat perenggan 7–8).

(2) Fakta bahawa deposit dalam kes ini berjumlah 12% tidaklah luar biasa atau melampau dalam keadaan-keadaan kes ini. Walau apa pun, perayu bukan sahaja terlibat dalam perjanjian jual beli tanah semata-mata, tetapi terlibat juga dalam projek mencantikkan seni bina sebuah bandar. Oleh itu, perayu perlu mendapatkan semula daripada responden pelan-pelan yang telah siap dirancang bagi pembangunan komposit dan perlu mencari pemaju yang boleh dipercayai. Dalam keadaan ini, 12% merupakan jumlah deposit yang adil dan wajar yang boleh disita (lihat perenggan 9).

(3) Di bawah s 75 Akta Kontrak 1950 ('Akta'), deposit sebenar boleh disita jika berlakunya kemungkiran kerana deposit melambangkan anggaran kerugian yang dialami oleh penjual. Tetapi, sebarang jumlah yang telah dibayar bagi baki harga pembelian hanya boleh disita apabila adanya bukti ganti rugi sebenar. Oleh itu, dalam kes ini, perayu hanya berhak menyita baki harga pembelian yang telah dibayar jika perayu dapat membuktikan kerugiannya. Namun, tiada bukti yang menunjukkan kerugian tersebut dan perayu hendaklah memulangkan wang tersebut kepada responden (lihat perenggan 13).

(4) Jika klausa 16.2 perjanjian-perjanjian tersebut memberi hak kepada perayu untuk menyimpan kesemua jumlah yang boleh disita tanpa perlu membuktikan kerugian, maka kesan klausa itu akan menyingkirkan aplikasi s 75 Akta tersebut. Tetapi, jika klausa 16.2 bermaksud sedemikian, klausa itu bercanggah dengan klausa 8.2(b) perjanjian-perjanjian tersebut. Ini kerana klausa 8.2(b) menyatakan bahawa perayu hendaklah memulangkan baki harga pembelian yang telah dibayar selepas menolak 12%, klausa 16.2 pula menyatakan sebaliknya. Apabila berlakunya percanggahan antara dua klausa dalam sesuatu perjanjian, maka kesamaran berlaku atas kesan bersama perjanjian-perjanjian tersebut. Memandangkan perayu memilih untuk bergantung kepada klausa 16.2 untuk mewajarkan penyitaan tersebut, klausa tersebut seharusnya dibaca contra proferentum terhadap perayu dan kesan kesamaran antara klausa 16.2 dan 8.2(b) hendaklah diselesaikan memihak kepada responden. Ini bermakna bahawa perayu tidak boleh menyimpan kesemua wang yang telah dibayar kepadanya (lihat perenggan 20).]

Notes

For a case on termination, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) para 2713.

For cases on forfeiture, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 3437–3449.

Cases referred to

Bhai Panna Singh v Bhai Arjun Singh AIR 1929 PC 179 (refd)

Lim Ah Moi v AMS Periasamy Suppiah Pillay [1997] 3 MLJ 323, CA (refd)

Linggi Plantations Ltd v Jagatheesan [1972]1 MLJ 89, PC (refd)

Stockloser v Johnson [1954] 1 QB 476, CA (refd)

Sun Properties Sdn Bhd v Happy Shopping Plaza Sdn Bhd [1987] 2 MLJ 711, SC (refd)

Yeoman Credit Ltd v Latter & Anor [1961] 2 All ER 294, CA (refd)

Legislation referred to

Contracts Act 1950 s 75

Contract Act 1872 [India] s 74

Appeal from: Originating Summons No 24–1265 of 2000(1) (High Court, Johor Bahru)

Vinayak Pradaan (Jack Siose and Pathmavathy with him) (Edwin Lim & Co) for the appellant.

RR Sethu (Jeev Anand with him) (How, Zul & Tan) for the respondent.

Gopal Sri Ram JCA:

[1] This is a tolerably plain case. We were prepared to deliver our decision at the close of arguments on 12 January. However, in deference to the careful arguments advanced by Mr Vinayak Pradhan of counsel for the appellant we reserved judgment to today. The factual matrix relevant to this appeal is as follows.

[2] The appellant entered into two even dated agreements with the respondent. Both agreements contain the same terms. Under each of these agreements the respondent purchased land from the appellant and undertook the further obligation to construct buildings on them in accordance with the plans prepared and provided by the appellant. The appellant's aim was to have a sea front project in Johor Baru for aesthetic improvement of that city. The purchase price for the land was to be paid by instalments. As to what would happen in the event of a justified termination of the agreements by the

appellant is provided for in two clauses in the agreements. They are cll 8.2(b) and 16.2. They are important. And this is what they say:

> 8.2 Consequences of termination of Agreement
>
> Upon the termination of this Agreement under Section 8 1(B) hereof and without prejudice to any other remedies which the Vendor is entitled under this Agreement:
>
> (a) …
>
> (b) All instalments previously paid by the Purchaser to the Vendor including the First Payment and any interest thereon paid as at the date of termination shall be forfeited to the Vendor absolutely, except where the termination occurs within four (4) months from the date of this Agreement, in which event an amount equal to ten per centum (10%) of the Purchase Price shall be forfeited to the Vendor absolutely, and all instalments previously paid by the Purchaser to the Vendor including the First Payment after deducting the amount forfeited shall be returned to the Purchaser, without interest;
>
> 16.2 Reasonable Compensation
>
> Both parties hereby unconditionally and irrevocably acknowledge that the sums stipulated in this Agreement to be payable by the defaulting party would constitute reasonable compensation to the non-defaulting party and each party hereto hereby waives any objection it may now or hereafter have that those sums would be otherwise than fair and reasonable compensation.

[3] It is common ground that the respondent made an initial payment of 12% and then made subsequent payments amounting in total to about 50% of the purchase price under both agreements and then made default. The appellant held the respondent in breach of the agreements and forfeited all the monies paid. The respondent commenced proceedings by originating summons and sought to recover all the money it had paid the appellant. The learned judicial commissioner who heard the summons held that the respondent was entitled to recover the whole sum paid by it and granted the appropriate relief. The appellant has appealed to us against that order.

[4] There are two issues before us. First, whether the 12% paid by the respondent is a true deposit. This turns upon the true construction of the agreements. Second, whether the appellant may keep for itself the whole of the 50% it was paid without proof of actual damage. This is a point of law which in our view is covered by high authority.

[5] Before we deal with the first issue we must observe that the agreements in question are unhappily drafted. They contain clauses that conflict with

each other or are tautologous. There are also ambiguities. For example, cl 2.2 of the agreements makes their validity dependent upon the respondent making what is described as 'the first payment' within three months from the date of the agreements. 'the first payment' is described in item 5 of the First Schedule as RM918,000 which works out to 12% of the purchase price. However, item 1 of the Second Schedule appears to require the first payment to be made immediately upon the execution of the agreements. In these circumstances, we are driven to do the best we can to interpret them.

[6] Now, nowhere in these agreements do they describe the first payment as a forfeitable deposit. Mr Pradhan argues that this is a mere question of labelling and that the law does not concern itself with labels. This submission in our judgment has merit. You will find many cases in the law reports that illustrate the point made by counsel. *Yeoman Credit Ltd v Latter & Anor* [1961] 2 All ER 294 is an example that readily springs to mind. There, a document was labelled by the parties as a guarantee. That did not prevent the court from examining its contents and coming to the conclusion that the document on its proper construction was in truth an indemnity.

[7] So too here. Look what happens if the respondent defaults. According to cl 8.2(b) the appellant gets to keep the 12% unless the default occurs within four months in which case he forfeits only 10%. According to this clause, the function of the first payment is to secure the future performance of the contract. Now, that is exactly what a true deposit does. As for authority on the point, you do not have to go beyond what Hashim Yeop Sani SCJ said in *Sun Properties Sdn Bhd v Happy Shopping Plaza Sdn Bhd* [1987] 2 MLJ 711 a case referred to by the learned judicial commissioner in his judgment in this case:

> A deposit is not merely a part payment but is also an 'earnest' money to bind the bargain entered into and creates by fear of its forfeiture a motive in the payer to perform the rest of the contract — see *Howe v Smith* (1884) 27 Ch D 89 at p 101. The deposit therefore serves two purposes, that is, if the purchase is carried out it goes against the purchase money but the primary purpose for the deposit is to act as a guarantee that the purchaser means business — per Lord MacNaghten in *Soper v Arnold* (1889) 14 App Cas 429.

[8] What the parties have described in their agreements as a first payment is therefore, when these agreements are construed as a whole, in reality a true deposit. And, in accordance with cl 8.2 the appellant is to forfeit it. The 12% is not treated by the law as a penalty. Once again we quote from the judgment of Hashim Yeop Sani SCJ said in *Sun Properties Sdn Bhd v Happy Shopping Plaza Sdn Bhd*:

The crux of the matter here is whether the $1,000,000 is a true deposit. If it is a true deposit or earnest money (the two terms being interchangeable) then the sum is irrecoverable by the respondent and it can lawfully be forfeited by the appellants. The fact that the amount is $1,000,000 does not alter the position since 10% of the purchase price is normally a standard amount put as deposit and as Lord Hailsham LC said in *Linggi Plantations Ltd v Jagatheesan* [1972] 1 MLJ 89:

> There is nothing unusual or extortionate in a 10% deposit on a contract for the sale of land.

[9] We may add that the fact that the deposit here is 12% does not make the deposit unusual or extortionate in the circumstances of this case. The appellant was not engaged in a mere sale and purchase transaction of land. There were other considerations here. A project was being launched to improve the skyline of a city; to architecturally enhance the beauty of a city. One can well imagine what would happen if individual developers to whom the land was sold begin to abandon construction mid-way. It would strike at the very objective aim of the whole scheme. The appellant will have to retrieve from the respondent the plans that had been drawn for a composite development and go about looking for a more reliable developer. All these and the other peculiar facts of this case make the 12% a fair and reasonable deposit which the appellant may forfeit. We therefore cannot agree with the finding of the learned judicial commissioner that the appellant must disgorge the 12%.

[10] That brings us to the second issue. Can the appellant keep the whole of the 50% (less the deposit) without proof of loss? Learned counsel for the appellant says that it can. The judicial commissioner held that it cannot. We agree with the learned judicial commissioner. There is no necessity to cite copious authorities. The relevant provision is s 75 of the Contracts Act 1950 which is *ipsissima verba* s 74 of the Indian Contract Act 1872. The section reads as follows:

> 75 When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

[11] The way in which the section is to be applied has been settled beyond argument by two decisions of the Privy Council. The first is *Linggi Plantations Ltd v Jagatheesan* [1972]1 MLJ 89 where Lord Hailsham when speaking of the Indian equipollent said that:

> Section 74 of the Contract Act (as amended) had no application to the forfeiture by a vendor of a reasonable deposit in a contract for the sale of land. The reason in substance was that, though it is true that s 74 was intended to cut through the rather technical rules of English law relating to the liquidated damages and penalties, and to apply in substance the equitable rule to all cases whether the sum provided in the contract was in substance a penalty or a genuine pre-estimate of the damage likely to be suffered, these technical rules had developed entirely separately from the law relating to deposits and for a very long time no one thought that the section in the Contract Act which superseded them had any application to the deposit cases, or, at least, wherever the point was argued, it was rejected by the Indian courts.

[12] The second is *Bhai Panna Singh v Bhai Arjun Singh* AIR 1929 PC 179. In that case, the purchaser had paid two sums to the vendor, a deposit of Rs 500 and a further sum of Rs 10,000. On the purchaser making default in completing the sale, the vendor purported to forfeit both sums. The Privy Council upheld the forfeiture of the deposit. In respect of the second sum this is what Lord Atkin who delivered the advice of the board said:

> The effect of s 74 of the Contracts Act of 1872 is to disentitle the plaintiffs to recover simpliciter the sum of Rs 10,000 whether as penalty or liquidated damages. The plaintiffs must prove the damages they have suffered.
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> The only evidence of loss is that of the loss on resale by Rs 1,000. There seems to be no ground for displacing the trial judge's finding that this was a genuine contract. The vendors remained in possession of the rents and profits of the property until resale, amounting, according to the evidence, Rs 450 to 500 per mensem. There is no ground for awarding them interest. On the other hand, they have received earnest money Rs 500 so that their actual damage is Rs 500.

[13] The upshot of these two decisions is that s 75 does not apply to a true deposit. This may be forfeited in the event of a default as it represents a genuine pre-estimate of the damage suffered by a vendor. However, any further sum paid towards the balance of the purchase price can only be forfeited upon proof of actual damage. So, in the present case the appellant is only entitled to forfeit the balance of the sums paid if it proved damage. Needless to say there was no such proof. As such it was obliged to return those monies to the respondent.

[14] That should really be sufficient to dispose this appeal. But there are two arguments raised before us that we must perforce deal with. The first is the submission by learned counsel for the respondent that the judicial commissioner was correct in directing the appellant to return all monies. According to Dato Sethu, the appellant had a choice of two courses open to it. It could have forfeited the 12% and refunded the balance. Or it could have

held onto the whole sum. Since it chose the latter course, it must refund the whole sum. We trust that we must be forgiven if we find this argument incomprehensible.

[15] As to the choices open to an innocent party when a contract is broken, this was dealt with by this court in *Lim Ah Moi v AMS Periasamy Suppiah Pillay* [1997] 3 MLJ 323 as follows:

> When the vendor's solicitors stated in their letter of 31 July 1986 their client's inability to convey 5.5 acres of the land to the appellant, there was a clear breach of the terms of the sale and purchase agreement. Once he received that intimation, the appellant had at least two alternatives open to him. These alternatives appear in s 40 of the Contracts Act 1950 which is in the following terms:
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> > When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.
>
> The other way of stating the rule is this. An innocent party against whom a contract is repudiated may either accept the repudiation and sue for damages or he may treat the contract as continuing and sue for specific performance.
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> There is, in my judgment, yet a third option available to the innocent party. It is the common law right of rescission, akin to but much narrower than its equitable counterpart. In the present case the appellant clearly made his election to rescind the sale and purchase agreement. Hence his demand for the return of the RM10,000. What he was in fact asking was a restoration of the status quo ante.
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> Having made this choice, he is bound by it. That much is clear from the judgment of Mason J (later CJ Australia) in *Sargent v ASL Developments Ltd* (1974) 131 CLR 634 at p 655 where he said:
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> > It will make for greater certainty, therefore, if the present cases are regarded as cases of election. A person is said to have a right of election when events occur which enable him to exercise alternative and inconsistent rights, ie when he has the right to determine an estate or terminate a contract for breach of covenant or contract and the alternative right to insist on the continuation of the estate or the performance of the contract. It matters not whether the right to terminate the contract is conferred by the contract or arises at common law for fundamental breach — in each instance the alternative right to insist on performance creates a right of election.
> >
> > Essential to the making of an election is communication to the party affected by words or conduct of the choice thereby made and it is accepted that once an election is made, it cannot be retracted (*R v Paulson* [1921] 1 AC 271 at p 284; *Tropical Traders Ltd v Goonan* (1964) 111 CLR 41 at p 55). No doubt this rule has been adopted in the interests of certainty and because it has been thought to be fair as between the parties that the person affected is entitled to know where he stands and that the person electing should not have the opportunity of changing his election and subjecting his adversary to different obligations.

Later, His Honour said (at p 658):

> For my part this proposition correctly states the law in its application to contracts as well as interests in property. If a party to a contract, aware of a breach going to the root of the contract, or of other circumstances entitling him to terminate the contract, though unaware of the existence of the right to terminate the contract, exercises rights under the contract, he must be held to have made a binding election to affirm. Such conduct is justifiable only on the footing that an election has been made to affirm the contract; the conduct is adverse to the other party and may therefore be considered unequivocal in its effect. The justification for imputing to the affirming party a binding election in these circumstances, though he be unaware of his alternative right, is that, having a knowledge of the facts sufficient to alert him to the possibility of the existence of his alternative right, he has acted adversely to the other party and that, by so doing, he has induced the other party to believe that performance of the contract is insisted upon. It is with these considerations in mind that the law attributes to the party the making of a choice, though he be ignorant of his alternative right. For reasons stated earlier, the affirming party cannot be permitted to change his position once he has elected.

In my judgment, the principles stated by Mason J apply with full force to the appellant's case. Having taken the stand that he did by his letter of 8 August 1986 he now cannot detract. His claim, if any, is confined to the recovery of the deposit he had paid and not to the land he had agreed to purchase.

[16] The right of making a choice available to an innocent party against a contract-breaker has no relevance at all to the fact pattern before us. Here the election was made by the appellant when it treated the contract as at an end and held on to the monies paid to it. No further right of election arises. So much for the respondent's submission.

[17] The second argument is that advanced by learned counsel for the appellant. He says that his client is entitled to retain the whole of the forfeited sum without proof of damage because of cl 16.2 of the agreements. That clause reads as follows:

> 16.2 Reasonable Compensation
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> Both parties hereby unconditionally and irrevocably acknowledges (sic) that the sums stipulated in this Agreement to be payable by the defaulting party would constitute reasonable compensation to the nondefaulting party and each party hereto hereby waives any objection it may now or hereafter have that those sums would be otherwise than fair and reasonable compensation.

[18] According to Mr Pradhan, the parties by the agreement in the foregoing clause had excluded the application of s 75 of the Contracts Act. It was therefore not open to the respondent to demand the return of any part

of the monies paid. Unfortunately for the appellant, there are two formidable obstacles over which this submission stumbles. They both have to do with the way in which these agreements are constructed. In the first place, if cl 16.2 means what Mr Pradhan says it means, then you can see that it contradicts cl 8.2(b). While the latter says that the appellant must refund the balance (after deducting the 12%) the former says quite the opposite. That cannot be right. Either the appellant can only have the 12% as stated in cl 8.2(b) or it is entitled to keep all the instalments it received because of what cl 16.2 according to counsel appears to say. So how are these two provisions in these agreements to be construed so that they are consonant with business sense?

[19] We think that the answer lies in adopting a harmonious interpretation that avoids an insensible contradiction. In our judgment, when these agreements are read as a whole, what cl 16.2 means is that the 10% or 12% which is to be forfeited by the appellant is not to be challenged by the respondent as not being fair and reasonable compensation. If you look at the objective aim of the transaction you will see why cl 16.2 was put in. Mark you, both parties knew that this was not a straightforward sale and purchase of land. As earlier rehearsed, there were other considerations here. The appellant as vendor of the land obviously did not want to face a challenge that it ought not to keep any of the sums it had received from the respondent on the ground that this was not an outright sale and purchase. That is why cl 16.2 is crafted in the way in we find it. Hence, cl 16.2 does not produce the effect that Mr Pradhan's ingenious argument says it does.

[20] Alternatively; and this is the second obstacle; if there is any conflict or contradiction between cll 8.2 and 16.2, then there arises an ambiguity as to what the joint effect of these two clauses is. Since it is the appellant who relies on cl 16.2 to justify the forfeiture, that clause should be read contra proferentum the appellant and the resulting ambiguity between it and cl 8.2 must be resolved in the respondent's favour. What that means is that it is not open for the appellant to keep all the monies.

[21] What we have said thus far about the true meaning of cl 16.2, makes it unnecessary for us to deal with the question whether parties to an agreement may contract out of s 75. That rather interesting question must await resolution upon some future occasion.

[22] The further point made by learned counsel for the appellant is that since by cl 16.2 the respondent has agreed to a forfeiture of all sums paid, it is for the respondent to apply to the court for relief against forfeiture and to prove by affirmative evidence that it is entitled to such relief. *Stockloser v Johnson* [1954] 1 QB 476 was relied on to support this submission. The short answer to counsel's argument is that already given in paras 18 and 19 of this

judgment. In any event, the present instance is a case of a breach of contract simpliciter. This is not a case involving the use of a contractual power of forfeiture for a collateral purpose, such as you will find in cases of building contracts. Neither is it a case where there has been the payment of a sum colourably termed as a deposit which upon closer examination turns out to be a penalty. On this point we find it sufficient once again to refer to the judgment of Lord Hailsham in *Linggi Plantations Ltd v Jagatheesan*:

> No doubt, as Cotton LJ says in *Howe v Smith* at p 95, there may be cases when equity would relieve a purchaser who has paid a deposit and then defaulted, although it is to be said that the last word is probably not yet spoken on this subject (see *Stockloser v Johnson* [1954] 1 QB 476). It is also no doubt possible that in a particular contract the parties may use language normally appropriate to deposits properly so-called and even to forfeiture which turn out on investigation to be purely colourable and that in such a case the real nature of the transaction might turn out to be the imposition of a penalty, by purporting to render forfeit something which is in truth part payment. This no doubt explains why in some cases the irrecoverable nature of a deposit is qualified by the insertion of the adjective 'reasonable' before the noun. But the truth is that a reasonable deposit has always been regarded as a guarantee of performance as well as a payment on account, and its forfeiture has never been regarded as a penalty in English law or common English usage.

[23] For the reasons already given we would allow this appeal in part and set aside so much of the High Court's order as requires the appellant to refund monies exceeding the 12% deposit. The order for costs made by the High Court is also set aside. Each party shall bear its own costs here and in the court below.

Appeal allowed in part. Part of High Court order set aside.

Reported by K Nesan